No. 48589-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DWAYNE PATRICK COWART,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 14-1-01149-2
The Honorable James Orlando, Judge

OPENING BRIEF OF APPELLANT

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3. Any future request by the State for appellate costs should be denied.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion and deny Dwayne Cowart his constitutional right to a fair and impartial jury by denying his challenge of a juror for cause, where the juror expressed actual bias against defendants charged with child abuse crimes, and where the court is required to excuse jurors who express actual bias, and where Juror 18 was seated on the jury that convicted him? (Assignments of Error 1 & 2)

2. If the State substantially prevails on appeal and makes a request for costs, should this Court decline to impose appellate costs where the trial court found that Dwayne Cowart does not have the present or future ability to pay trial costs, he has previously been found indigent, and there is no

evidence of a change in his financial circumstances? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Dwayne Patrick Cowart by Amended Information with one count of felony murder in the second degree, with first or second degree assault of a child as the predicate felony (RCW 9A.32.050). (CP 12) The State also alleged that the offense was aggravated because it was a domestic violence incident, the victim was particularly vulnerable, and Dwayne used his position of trust to commit the offense (RCW 10.99.020; RCW 9.94A.535(3)(b)(n).[1] (CP 12-13) The jury found Dwayne guilty of the substantive charge and the aggravators. (CP 227-30; RP 2176-80) The trial court imposed an exceptional sentence totalling 840 months of confinement, and ordered Dwayne to repay only mandatory legal financial obligations (LFOs). (CP 237-38, 240; RP 2197) Dwayne timely appeals. (CP 257)

B. SUBSTANTIVE FACTS

Dwayne and Mary Cowart met and began dating while they

[1] Several witnesses share the last name Cowart. To avoid confusion, they will be referred to by their first names in this brief.

were both serving in the United States Army. (RP 663-64, 665, 1877) They talked about wanting to start a family together, and were excited when they learned that Mary was pregnant. (RP 665, 665-66, 726, 1880-81, 1882) They soon married and were transferred to Washington State, where they were both assigned to work as guards at the Army prison at Fort Lewis. (RP 662, 664, 665, 667, 1877, 1883-84)

Dwayne already had three children from a previous marriage. (RP 728, 1878) Dwayne's child support payments, their car payments, the cost associated with Mary's dogs, and other life expenses put a strain on Dwayne and Mary's finances. (RP 679, 1884) Mary resented that Dwayne was making child-support payments to his ex-wife, and she was unsympathetic to how much Dwayne missed his children. (RP 1885) But Mary and Dwayne were generally happy together. (RP 735, 1886)

Their daughter, B.C., was born on January 7, 2014. (RP 668) B.C. was a normal, healthy baby, and Dwayne loved B.C. and was calm and gentle with her. (RP 669-70, 775, 776). But when B.C. was nine days old, Mary and Dwayne called 911 because they were concerned about B.C. (RP 518-19, 709-10, 1912-13) According to Dwayne, B.C. was in a sling in the bathtub when she

began making gurgling noises. (RP 521-22, 709-10, 1912-13) Dwayne thought there might be something blocking her airway, so he put his finger in her mouth to sweep out any possible blockages. (RP 522, 709-10, 1912-13) This sweep cut the roof of B.C.'s mouth, and she began bleeding. (RP 523)

Mary also testified about an incident when B.C. rolled off the couch and onto the floor. Mary was concerned that B.C. might have suffered a head injury, but B.C. seemed fine. (RP 707-08, 1918)

Mary had just six weeks of maternity leave before she and Dwayne had to face the challenge of finding reliable, affordable child care so that they could both continue to work, a necessity based on their financial circumstances. (RP 670, 673, 679, 1838) Mary worked a day shift at the army prison, and Dwayne worked a night shift. (RP 670-71) At first, Dwayne cared for B.C. during the day while Mary worked, and Mary cared for B.C. at night while Dwayne worked. (RP 673-74) Mary eventually arranged to have her friend Shelly Qvicklund care for B.C. during the day, but that arrangement was put on hold when Qvicklund had to leave town after a death in the family. (RP 677-78, 1300)

Mary also considered sending B.C. to live in Texas with

Dwayne's family. (RP 679-80, 1915-16) She mentioned the idea to Dwayne's mother and sister, who were surprised by the suggestion. (RP 1837-38, 1856-57) Mary did not pursue the idea any further. (RP 681-82)

Qvicklund eventually returned, and cared for B.C. for the first time on March 24, 2014. (RP 1302) Mary testified that B.C. was behaving normally that morning, and did not seem to be in any distress when she left her with Qvicklund around 6:00 AM. (RP 682-83, 685) Qvicklund also testified that B.C. seemed happy and comfortable that morning. Qvicklund saw no signs that B.C. was in pain, and had no trouble feeding or comforting B.C. (RP 1306-08)

After Dwayne returned from his shift, he told Mary that he would like her to bring B.C. home so that he could take care of her that afternoon. (RP 758-59, 1303, 1923) Mary picked up B.C. from Qvicklund's house around 11:30 AM and took her home. (RP 685, 1303) B.C. was awake and not fussing, and did not seem to be in any pain. (RP 686-87)

Dwayne was asleep when Mary and B.C. arrived home, so Mary put her into a baby swing, woke Dwayne to tell him to feed B.C., and left for work. (RP 688-89, 1927-28) B.C. was asleep and seemed fine when Mary left. (RP 690, 1927-28)

Around 4:00 PM, Mary received a phone call from a panicked Dwayne, telling her that B.C. was not breathing. (RP 690-91) Dwayne also called 911, then began CPR in an effort to revive B.C. (RP 1938) When medical responders arrived, B.C. was lying on the floor and Dwayne was crouched over her, still performing CPR. (RP 533, 553-54) They also noticed a pinkish fluid in B.C.'s nose and mouth. (RP 541, 557) The responders were eventually able to restore B.C.'s heartbeat, but they were not able to restore her breathing. (RP 542, 543, 557)

B.C. was transported to the hospital for further tests and treatment. (RP 691) Sadly, B.C. did not regain consciousness, and doctors discovered that she had sustained a fractured femur, multiple skull fractures, several broken ribs, and intracranial bleeding. (RP 575-78, 1406) B.C. also suffered severe brain damage. (RP 1221-22, 1231-32, 1342, 1355, 1403) The doctors opined that B.C. would have a short life and would never be able to walk, talk, eat, or regain consciousness, and would require permanent life support. (RP 1229-30, 1355, 1669-70, 1672, 1679-80, 1682) After meetings and consultations with doctors, counselors and medical ethicists, Mary made the decision to discontinue B.C.'s life support. (RP 702-03, 1172-73, 1595, 1608)

B.C. passed away soon after. (RP 705)

According to the various medical experts, the intracranial bleeding and brain damage likely caused B.C. to suffer a cardiac arrest and stop breathing. (RP 578, 1236-37, 1345, 1416-17) Several experts believed B.C. would have shown noticeable symptoms and changes in behavior almost immediately after such a severe head injury. (RP 1135-36, 1253-54, 1346)

However, several experts testified that the brain injury could have occurred hours before the cardiac event, and that a significant part of the brain damage could have occurred as a result of the subsequent oxygen deprivation. (RP 1346-47, 1418, 1425, 1427, 1432)

The experts noted that B.C. had recent rib fractures and older, healing rib fractures. (RP 865-66, 1114, 1116, 1349-50) She suffered a spiral fracture to her femur, which would have been caused by a forceful twist of her leg. (RP 859, 1111) A spiral facture is extremely painful, and B.C. would have been in immediate and obvious pain. (RP 1348) B.C. also had skull fractures on both sides of her head, and multiple subdural hematomas (bleeding inside the skull). (RP 886-87, 1119, 1120, 1131) It is unusual to see these types of injuries in an infant. (RP

858-59, 860, 886, 1328-29) Such injuries are usually the result of non-accidental trauma and require a significant application of force. (RP 879, 886-87, 1122-23, 1131, 1328, 1331, 1353)

William Stewart, who received a substantial reduction in charges and sentence duration in exchange for his testimony, met Dwayne in the Pierce County Jail when they were both awaiting trial on criminal charges. (RP 927-28, 947-49) Stewart claimed that Dwayne told him that he thought Mary was planning to leave him and he schemed to get her pregnant so she would have to stay with him. (RP 932-33) But the plan did not work, because Mary still wanted to leave him even after B.C. was born. (RP 933) Stewart claimed that Dwayne told him he started taking his frustrations out on B.C. (RP 933) According to Stewart, Dwayne said he squeezed B.C. and broke her ribs, and "waterboarded" her in the bath. (RP 934) But he stopped hurting B.C. for a while because he was scared after the paramedics had to be called. (RP 934-35)

According to Stewart, Dwayne told him that he twisted B.C.'s leg and heard it snap, then he shook B.C. and hit her head against his knee. (RP 937) After that, B.C. was quiet and went to sleep. (RP 937-38) He later saw blood on his shirt and saw that B.C. was

motionless, so he called 911 and tried to administer CPR. (RP 940) Stewart claimed that Dwayne told him he would blame the paramedics or Mary for B.C.'s injuries. (RP 942-43)

Contrary to Stewart's story, but consistent with Mary's testimony, Dwayne testified that he and Mary were happy together and both wanted to have children. (RP 665, 666-67, 735, 1881-82) On the day that B.C. was hospitalized, Dwayne slept after Mary left, but awoke to B.C.'s loud, piercing screams. (RP 1930-31) He picked her up and tried to feed and comfort her, but she was still fussy. (RP 1934) B.C. eventually went back to sleep, but woke again crying. (RP 1935-36) Eventually, B.C. fell asleep on Dwayne's chest. (RP 1937) When Dwayne awoke a short time later, he heard gurgling sounds and saw blood on his chest. (RP 1937) He dialed 911 and immediately started CPR. (RP 1938)

When questioned about B.C.'s injuries, Dwayne said he did not know how they would have happened. At first, when interrogated by the police, he agreed that he must have caused her injuries. (RP 1940, 1942-43; Exh. P75) But he later explained that he only agreed because, at the time, he simply did not understand how she suffered her injuries and could not think what else could have caused them. (RP 1940, 1942-43, 1968, 1971, 1974-75) At

trial he reiterated that he did not intentionally hurt B.C. (RP 1948) And he denied telling Stewart that he intentionally hurt B.C. (RP 1969-70)

A number of witnesses, including family members, medical personnel and social workers, were concerned that Mary appeared to be emotionally disconnected from B.C. both before and after her hospitalization. (RP 1191, 1194, 1362, 1770, 1807, 1811, 1827, 1830, 1856, 1886, 1887-88) They noted that Mary appeared more concerned with her dogs, with her marriage, and with possible punishment faced by Dwayne, than with B.C. and her condition. (RP 1196, 1766-67, 1768, 1770, 1864, 1887)

IV. ARGUMENT & AUTHORITIES

A. DWAYNE COWART WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY AS A RESULT OF THE TRIAL COURT'S FAILURE TO EXCUSE JUROR 18.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a defendant is guaranteed the right to a fair and impartial jury. State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983). The right to an impartial jury is also protected by statue and the criminal rules, which place the trial court under a continuous obligation to excuse any juror who is unfit and unable to perform

the duties of a juror. State v. Jorden, 103 Wn. App. 221, 226-27, 11 P.3d 866 (2000).[2]

RCW 2.36.110 specifically mandates that a judge excuse any juror who is unfit due to "bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." Where a potential juror demonstrates actual bias, the trial court must excuse that juror for cause. CrR 6.4(c); Ottis v. Stevenson-Carson School District No. 303, 61 Wn. App. 747, 752-53, 812 P.2d 133 (1991). Actual bias is defined as "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging[.]" RCW 4.44.170(2).

The trial court's decision whether to excuse a juror is reviewed for an abuse of discretion. State v. Elmore, 155 Wn.2d

[2] See RCW 2.36.110 ("[i]t shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service"); CrR 6.4(c)(1) ("[i]f the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case"); CrR 6.5 ("[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged").

758, 768-69, 123 P.3d 72 (2005); State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d 217 (2009) (quoting State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008)).

In Rupe, the defendant argued that the trial court denied his right to a fair and impartial jury by refusing to excuse jurors he believed were predisposed to invoke the death penalty. 108 Wn.2d at 748. Our Supreme Court reviewed the voir dire of the jurors at issue, concluded their responses were equivocal, and held that a trial court is not required to excuse a juror who has preconceived ideas if the juror can put his concerns aside to decide the case on the evidence and apply the law provided by the court. Rupe, 108 Wn.2d at 748-49.

In State v. Gonzales, a juror stated she was more likely to believe police testimony, repeated her opinion several times, and responded that she did not know if she could presume the defendant innocent. 111 Wn. App. 276, 278-79, 45 P.3d 205 (2002). Division 1 reversed, noting that the juror unequivocally admitted a bias regarding the police, believed the bias would affect

her deliberations, did not know if she could presume that Gonzales was innocent in the face of officer testimony, and was never rehabilitated. Gonzales, 111 Wn. App. at 281.

And in State v. Fire, the challenged juror stated, "I consider him a baby raper [sic], and [the crime] should just be severely punished[,]" and "I'm very opinionated when it comes to this kind of crime." State v. Fire, 100 Wn. App. 722, 724, 998 P.2d 362 (2000), *reversed on other grounds,* 145 Wn.2d 152 (2001). The potential juror also admitted that it was possible that his strong feelings about this kind of case could affect his determination of guilt or innocence, in light of his belief in the innocence of children and the relative lack of credibility of adults. 100 Wn. App. at 724. The prosecutor attempted to rehabilitate the potential juror by asking him whether he would follow the court's instructions despite his strong feelings, and the potential juror agreed in one-word responses. 100 Wn. App. at 724-25. The trial court refused to excuse the challenged juror for cause, focusing on these affirmative responses. 100 Wn. App. at 725.

The Court of Appeals reversed, finding the prospective juror had admitted actual bias and his "one-word affirmative responses did not indicate … he had come to understand that he must lay his

preconceived notions aside, in order to serve as a fair and impartial juror. Indeed, it is entirely possible that the potential juror may have believed it was possible to retain his preconceived notions and still follow the instructions of the court – most of which instructions he had not yet heard." Fire, 100 Wn. App. at 729.

In this case, the trial court abused its discretion by failing to excuse Juror 18 for cause, after she repeatedly expressed her inability to be fair and impartial when the charges involved child abuse. (RP 233-43) During voir dire, Juror 5, Juror 7, Juror 8, Juror 17, and Juror 36 also doubted their ability to be fair when a defendant was charged with abusing a child. (RP 196-98, 199-203, 230-32, 313-14, 392-93) Dwayne's for-cause challenges of Juror 7 and Juror 36 were granted. (RP 203, 314) But the trial court denied Dwayne's for-cause challenges of Juror 8 and Juror 18. (RP 239-40, 243, 426, 428-29) Dwayne then used peremptory challenges to strike Juror 8, Juror 5 and Juror 17. (CP 174-75, 173) But Juror 18 was seated on the panel. (CP 175, 178)

During individual questioning, Juror 18 repeatedly stated that it would be hard for her to be fair. (RP 233, 234-35, 238) She explained that, when she got her jury summons, "[a]ll I thought was, please don't put me on anything involving child abuse, and then this

… [b]ecause it's horrible, and I don't want to see pictures." (RP 238) She agreed that it was possible she "might find him guilty, because [she] want[ed] to find him guilty because it's such a horrific crime to have hurt a child." (RP 239)

Juror 18 also informed the court that she thought she had heard about Dwayne's case on the news, or that she heard a similar news story where a "child died in the care of this man … and I remember at the time it just horrified me." (RP 236-37, 242-43) And she clearly expressed her predisposition to believe Dwayne was guilty when she said, "I just feel like if this man was in charge of that child, and this child died, there has to be something there." (RP 236)

The prosecutor attempted to rehabilitate Juror 18 by asking whether she could put her emotions aside and follow the law as set forth in the jury instructions. All Juror 18 could say was that she hoped she could, and that she would try not to "make [her] decision potentially on the emotions involved rather than what the evidence is." (RP 238, 241)

Unlike in Rupe, Juror 18's statements expressing her predisposition against a person charged with a child abuse crime and against Dwayne were unequivocal. Her only equivocal

statements were about her ability to put aside her emotions to decide the case on the evidence and apply the law provided by the court. Thus, as in Gonzales and Fire, Juror 18's statements unquestionably met the definition of actual bias, she expressed only a "hope" that she could follow the law, and the prosecutor's attempts at rehabilitation failed. The trial court should have excused her for cause.

Where a juror who should have been dismissed for cause is seated, the defendant's conviction must be reversed. United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000); State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001). A defendant need not use a peremptory challenge on the biased juror in order to preserve the issue; the mere fact that the juror served on the jury is sufficient evidence that the defendant was denied a fair and impartial jury. Fire, 145 Wn.2d at 158; Gonzales, 111 Wn. App. at 282.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.[3]

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is "a matter of discretion for the appellate court," which may "decline to order costs at all," even if there is a "substantially prevailing party." Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the

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[3] Recently, in State v. Sinclair, Division 1 concluded "that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). Cowart is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1's interpretation of RAP 14.2.

"substantially prevailing party" on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Dwayne's case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Dwayne owns no property or assets, has no savings, and has no job and no income. (CP 277-79) Dwayne will also be incarcerated for the next 70 years. (CP 240) And, finding that Dwayne will not have the ability to pay LFOs now or in the future, the trial court declined to order Dwayne to pay any non-mandatory trial LFOs. (RP 2197; CP 238) Thus, there was no evidence below, and no evidence on appeal, that Dwayne has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Dwayne is indigent and entitled to appellate review at public expense. (CP 281-83) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption

of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

> The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Dwayne's financial situation has improved or is likely to improve. Dwayne is presumably still indigent, and this Court should decline to impose any appellate costs that the State may

request.

V. CONCLUSION

Because Juror 18 was clearly shown to be biased, the trial court's denial of Dwayne's for-cause challenge was error and Dwayne was denied his right to a fair and impartial jury. Dwayne's conviction must be reversed. This Court should also decline any future request to impose appellate costs.

DATED: August 29, 2016

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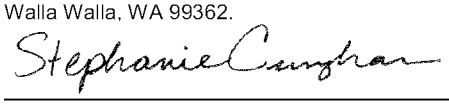
CERTIFICATE OF MAILING

I certify that on 08/29/16, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Dwayne P. Cowart, DOC# 388801, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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